91-2084

No. (2)

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1991

JOHN VILD,

Petitioner,

v.

DOMINIC A. VISCONSI et al.,

Respondent.

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN VILD,	)	Case No. 89-1934
	)	
Plaintiff,	)	
	)	
- v -	)	ORDER
	)	
DOMINIC A. VISCONSI, et al,	)	
	)	
	)	
Defendants.	)	

Battisti, J.,

Before the court is Defendants' Motion to Dismiss Plaintiff's First Amended Complaint ("Complaint"). Plaintiff John Vild claims violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1961, et seq., and seeks injunction and damages. Plaintiff also seeks damages for alleged common law fraud, intentional interference with business relationship, conversion,

negligence, and breach of contract. Defendants Dominic A. Visconsi, C.W. Sattenfield, Patricia Sattenfield, and Gerald Plonski seek dismissal of Plaintiff's First Amended Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), arguing that Plaintiff fails to state a claim upon which relief can be granted with respect to the alleged RICO claims and fails to allege fraud with particularity. Defendants also argue that if the RICO actions are dismissed this Court is without subject matter jurisdiction as there is no diversity of citizenship under 28 U.S.C. Section 1332(a).

FACTS

Plaintiff, who "can be found," at a Valley View, Ohio address, conducts business under the name of Mariner

Company. (Complaint at Para. 4). Defendants consist of four individuals, an entity, and ten unnamed Defendants. Defendant Visconsi, who "can be found," at a Chagrin Falls, Ohio address, and Defendants C.W. and Patricia Sattenfield, who "can be found," at a Florida address, (Complaint at Paras. 5-7), principally own, operate, and/or control entities known as Longboat Ventures Ltd., Longboat Bay Club, Sea/Mountain Resorts, Inc., Sea and Ski, DVB Inc., and Resort Properties of America. (Complaint at Para. 8). Sea/Mountain Resorts, Inc., a named Defendant, is an Ohio Corporation, having its principal place of business in Seven Hills, Ohio. (Complaint at Para. 10). The ten unnamed Defendants, represent officers, directors, and shareholders of Defendant Sea/Mountain Resorts, Inc. (Complaint at Para. 11). A final

Defendant, Gerald Plonski, "can be found" at a Garfield Heights, Ohio address. (Complaint at Para. 9).

In substance, Plaintiff alleges that he entered a marketing agreement with Longboat Ventures Ltd. to market, in Ohio, the Longboat Bay Club and that due to misrepresentations regarding the terms and conditions of the agreement, Plaintiff has been damaged through loss of profits and loss of advantageous business relationships. Plaintiff claims that the Defendants, who are allegedly associated in fact though not in law, committed: (1) acts of wire fraud, in violations of 18 U.S.C. Section 1343; (2) mail fraud, in violation of 18 U.S.C. section 1341; (3) violations of the Hobbs Act, 18 U.S.C. Section 1951; and (4) extortion, in violation of Ohio Rev. Code Ann. Section 2905.11.

Specifically, beginning on or about late January, 1989, (Complaint at Para. 14), Plaintiff alleges that Defendant contacted Plaintiff by telephone, "to induce Plaintiff to market Longboat Bay Club in the State of Ohio." (Complaint at Para. 15). Defendants allegedly misrepresented "material facts regarding said business venture, including but not limited to the fact that sufficient start-up capital was presently available and in the possession and control of the RICO Defendants, and such capital was intended to be given to Plaintiff for his use in marketing Longboat Bay Club," (Complaint at Para. 17), and "materially misrepresent[ed] to Plaintiff certain terms and conditions under which Longboat Bay Club would be marketed," (Complaint at Para. 21). Further, Defendants allegedly solicited potential customers

of Longboat Bay Club to purchase interest in Longboat Bay Club and that the customers relied on "unlicensed salespersons and an illegally registered broker to 'sell' them their interests," (Complaint at Paras, 22-23).

Plaintiff alleges that Defendants sent letters to potential customers to attend a sales program to sell Longboat Bay Club interests and that the letters "did not properly, under state law, quote the odds of winning various prizes, failed to properly state that customers had to attend a sales presentation, and improperly used the word "sweepstakes." (Complaint at Paras. 28-29).

Plaintiff claims that Defendants failed to register Longboat Bay Club to conducts sales in Ohio, delaying the opening date, and causing Plaintiff "to advance start-up capital for Longboat Bay

Club when such capital was to be supplied by the RICO Defendant." (Complaint at Paras. 36-37).

Plaintiff further alleges that Defendant Sattenfield attempted to change certain terms of the Marketing Agreement, threatening to "damage Plaintiff's business repute: and telling "Plaintiff that when making his decision regarding the 'new' terms of the Marketing Agreement, Plaintiff should 'think about [his] family,'" (Complaint at Paras. 38-39). Due to Plaintiff's refusal to comply with a certain term, Defendants "refused to provide any additional start-up capital and essential inventory of Longboat Bay Club interests to Plaintiff in order to market Longboat Bay Club," (Complaint at Para. 44), and amounts to which Plaintiff was entitled. (Complaint at Para. 45). Finally,

Defendants allegedly "attempted to takeover the Plaintiff's office by making phone calls to Plaintiff's landlord in an effort to assume Plaintiff's business location to market longboat Bay Club," (Complaint at Para. 46).

A "Marketing Agreement" dated June 15, 1988 and entered into by the Mariner Company and Longboat Ventures Ltd. is attached to the Complaint. (Complaint, Exhibit B). Also attached to the complaint is an agreement allegedly making Defendant Plonski dealer in charge of sales of interests in Longboat Bay Club on behalf of Plaintiff. (see Complaint at Para. 9 and Exhibit A).

DISCUSSION

Plaintiff alleges that jurisdiction "arises under RICO, 18 U.S.C. Section 1964 (a) and (c), and because the amount

in controversy exceeds fifty thousand dollars ($50,000) and diversity of citizenship exists between the parties, 28 U.S.C. Section 1332 . . .."

(Complaint at Para. 2).

Plaintiff alleges violations of subsections (a) through (d) of 18 U.S.C. Section 1962 of RICO:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt ... to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any

> enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt....
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. Section 1962

Defendants argue that the court does not have diversity jurisdiction under 28 U.S.C. Section 1332. Defendants further argue that, pursuant to Federal rules of Civil Procedure 12 (b)(6) and 9(b), Plaintiff's RICO claims are deficient in that Plaintiff fails to allege certain necessary elements of the a civil RICO

cause of action: namely, "enterprise"; "predict acts"; and, a "pattern of racketeering activity." Defendants also argue that Plaintiff has failed to allege certain particular elements of subsections (a) through (d).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), the court "must accept all of the plaintiff's allegations as true and resolve every doubt in his favor." Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 489 (6th Cir. 1990)(citing Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229. 2232, 81 L.Ed.2d 59 (1984)). "[A] complaint should not be dismissed for failure to stat a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct.99, 102, 2 L.Ed.2d 80 (1957).

1. Diversity

Since Plaintiff has not alleged facts showing that "each defendant is a citizen of a different State from each plaintiff, Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978), 28 U.S.C. Section 1332 does not confer subject matter jurisdiction on the court.

2. Failure to State a RICO Claim

To properly allege a violation of Section 1962, Plaintiff must allege conduct of an enterprise through a pattern of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985).

An "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and

any union or group of individuals associated in fact although not a legal entity ...." 18 U.S.C. Section 1961(4). An enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United State v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). "The 'enterprise' is not the 'pattern of racketeering activity'; it is "an entity separate and apart from the pattern of activity [a series of criminal acts] in which it engages." Id.

Pleading RICO predicate acts involving fraud must conform with the requirement of Federal Rule of Civil Procedure 9(b) requiring that "[i]n all averments of fraud, the circumstances constituting fraud shall be stated with

particularity." See, e.g., Michaels Building Co. v. Ameritrust Co., 848 F.2d 674 (6th Cir. 1988). For example, "[f]raud alleged in a RICO civil complaint for mail fraud must state with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts showing the plaintiff's reliance on defendant's false statement of fact." Blount Financial Services, Inc. v. Walter E. Heller & Co., 819 F.2d 151, 152 (6th Cir. 1987). However, "Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8 [codifying policy of simplicity in pleadings]; rather the two rules must be read in harmony." Michaels, 848 F.2d at 679.

A "'pattern of racketeering activity' requires at least two acts of racketeering... the last of which

occurred within ten years...after the commission of a prior act of racketeering activity." 18 U.S.C. Section 1961(5). While a "pattern" requires proof of more than simple two predicates, "it might encompass multiple predicates within a single scheme." H.J. Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893, 2899 (1989). A "pattern" requires that "the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J., 109 S.Ct. at 2900.

The element of relatedness exists if the predicates "'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" H.J., 109 S.Ct. at 2901

(quoting 18 U.S.C. Section 3575(e)).

"'Continuity' is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects in to the future with a threat of repetition." H.J., 109 S.Ct. at 2902. Plaintiff can show "continuity over a closed period by probing a series of related predicates extending over a substantial period of time." H.J., 109 S.Ct. at 2902. A "pattern" also can exist "if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit." Id.

In the instant case, there exists no set of facts to show "continuity." At best, the predicate acts alleged occurred over period of only a few months, and therefore, cannot be considered to have

extended over a "substantial" period of time. See H.J. Inc., 109 S.Ct. 2902 ("Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity requirement]."). This case differs significantly from one in which the alleged conduct occurs over some years. See, e.g., Dana Corp. v. Blue Cross & Blue Shield, 900 F.2d 882 887 (6th Cir. 1990)("allegations of fraud occurring for a period of seventeen years, along with the specific mailings evidencing the scheme, are sufficient to state a claim of a pattern of racketeering activity.").

Furthermore, Plaintiff has demonstrated no "threat of long-term racketeering activity," H.J. Inc., 109 S.Ct. 2902. Unlike the example provided in H.J. of the"hoodlum...sell[ing]

'insurance' to neighborhood storekeepers to cover them against breakages of their windows, telling his victims he would be reappearing each month to collect the 'premium' that would continue their 'coverage,'" Plaintiff's alleged related predicates do not include a specific threat of repetition extending indefinitely into the future." H.J., 2893 S.Ct. at 2902. At best, the acts alleged amount to a breach of contract but threaten no continued activity. Although the threat of continued activity may also be established "by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," id, at 2902, Plaintiff has made no such showing. Again, the acts alleged amount at best to a breach of contract with a single customer.

Because Plaintiff has not properly

pleading the requisite "pattern of racketeering activity," Plaintiff's RICO claims must be dismissed, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The court need not determine, therefore, whether Plaintiff properly pleaded the elements of "enterprise" and "predicate acts" or the particular elements of subsections (as) through (d) of Section 1962.

3. Conclusion

Accordingly, Plaintiff's claims must be dismissed for lack of subject matter jurisdiction based on diversity of citizenship and failure to state a claim upon which relief can be granted with respect to the alleged RICO causes of action.

IT IS SO ORDERED

[signature]

Frank J. Battisti
United States
District Judge

[Order filed June 26, 1990]

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Case Nos. 90-4048/4088

JOHN VILD,	)	
	)	
Plaintiff,	)	
	)	
- v -	)	ORDER
	)	
DOMINIC A. VISCONSI, et al,	)	
	)	
Defendants.	)	

BEFORE: GUY, Circuit Judge; WELLFORD, Senior Circuit Judge; and CHURCHILL,* Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been

referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Guy would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

[signature]

Leonard Green, Clerk

*Hon. James P. Churchill sitting by designation for Eastern District of Michigan.

[Order filed March 27, 1992]

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-4048/4088

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN VILD,
Plaintiff-Appellant, Cross-Appellee,

v.

DOMINIC A. VISCONSI; PATRICIA SATTENFIELD; SEA/MOUNTAIN RESORTS, INC.; C. W. SATTENFIELD; GERALD PLONSKI; JOHN DOES;
Defendants-Appellees, Cross-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed February 10, 1992

Before: GUY, Circuit Judge; WELLFORD, Senior Circuit Judge; and CHURCHILL*, Senior District Judge.

WELLFORD, Senior Circuit Judge, delivered the opinion of the court, in which CHURCHILL, Senior

*The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, certify that on this 9th day of July, 1992, I filed 40 copies of a Supplemental Appendix with the Clerk's Office of the Supreme Court of the United States and further certify that I mailed via first class mail, postage prepaid, the required three (3) copies to Mark I. Wachter and Paul I. Caimi of MAYS, KARBERG & WACHTER, Suite 250, Corporate Circle, 30100 Chagrin Boulevard, Cleveland, OH 44124-5705. The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

Barbara Grove

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